

## OBJECTIVES OF PRE-TRIAL PROCEDURE

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Pre-trial procedure in this country came into its own in 1938 with the adoption of the Federal Rules of Civil Procedure and its famous Rule 16. As the original notes to that rule point out, pre-trial had previously been in use in certain courts, notably in Detroit and Boston; and the results had been most promising.<sup>1</sup> But it is clear that Rule 16 gave it wide appeal and is the basis for its present popular standing about the country. For that rule not only operates in the dozen or so jurisdictions which have adopted the Federal Rules essentially in toto and the like number which have accepted substantial portions, but it has been adopted separately in many other jurisdictions, including, too, purely local or metropolitan areas. It has been the most popular of all the Federal Rules.<sup>2</sup>

Undoubtedly the prestige which the Federal Rules have acquired has helped in the spread of pre-trial. But the latter has achieved a momentum all its own. It has an unchallengeable appeal as an effective means of speeding up the court process and making it more efficient and effective. The very form of the rule has had its utility as showing on its face the various facets of its operation and the places where it may operate with practical utility. This accomplishment of drafting we owe to the late William D. Mitchell, the chairman of the Supreme Court's Advisory Committee, who realized the gain in utility from a separate naming and specification of the occasions for its use. A broad and general authorization would not have brought home to either judges or lawyers the things which

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<sup>1</sup> Advisory Committee Note to F.R. 16 and authorities there cited. See Sunderland, *The Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215, 21 J. AM. JUD. SOC'Y 125 (1937); RAGLAND, *DISCOVERY BEFORE TRIAL* c. XXVI, 227-240 (1932); 1 BARRON & HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* 950, 951 (1950).

<sup>2</sup> Pre-trial is now officially authorized in 41 jurisdictions. REP. OF THE COMMITTEE ON PRE-TRIAL PROCEDURE TO THE JUD. CONF. OF THE UNITED STATES, Sept. 9, 1955; and see also REP. OF THE PRE-TRIAL COMMITTEE, SECTION OF JUD. ADMINISTRATION OF A.B.A., August 23, 1955, 17 F.R.D. 474, 475; VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* 206-218 (1949). The Federal Rules have been adopted fully in 13 jurisdictions in addition to the federal court system; substantial portions have been adopted in 10 more, with additional portions in yet 4 more, and of course F.R. 16 quite generally as indicated. Clark, *A Modern Procedure for New York*, 30 N.Y.U.L. REV. 1194, 1200, n. 18 (1955); Wright, *Rule 56(e): A Case Study on the Need for Amending the Federal Rules*, 69 HARV. L. REV. 339, 357 (1956).

pre-trial can do.<sup>3</sup> This is another example where, in the judgment of observers, specification has been most helpful in aiding in the popular spread of a procedural device. A similar case is that of depositions and discovery, where a mere general authorization would not have brought home to courts or counsel the various types of depositions and discovery and the practical utility of their use as do the separate and fairly extensive provisions of Federal Rules 26 to 37 inclusive in the section headed, "Depositions and Discovery."<sup>4</sup>

Hence it is that the detailed specifications of Rule 16 do set forth admirably the objectives of pre-trial. I shall take these up somewhat more fully below; but first I should like to stress the central purpose of all. It is, as I like to view it, the individualization of the case, so that it may be separated for its own particular treatment from the vast grist of cases passing through our courts in daily routine toward negotiation and settlement and, occasionally, trial. So viewed, I think we have a better picture of just what pre-trial should accomplish and its meaning and importance in the conduct of litigation. Indeed I think this aspect is often overlooked or perhaps understressed by even the friends and protagonists of the device. For unless it very definitely separates the particular case from the whole mass of litigation and makes it real at this early stage of the litigation, it has accomplished very little.

Of course we recognize that a case must be made vivid and real in the actual trial by court or jury when it has reached that stage; and it has long been accepted that the court can then properly take steps to find out what the issues dividing the litigants are and to require the counsel to make these clear.<sup>5</sup> Pre-trial is a means of doing this necessary job at an earlier stage than the final battle when the lists are set. It is designed to achieve the several advantages that early disclosure may give, among which are obviously the making unnecessary of various possibilities of trial which the conference shows to be eliminable either because certain facts are accepted by all or because they have no real place in the actual dispute. And so, of course, this process of selection and choice may show the parties how close they are together and how they may go the small remaining distance to reach a settlement without the agony of trial.

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<sup>3</sup> See Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 501, 502 (1950). Now that the Advisory Committee has been discharged and its work is only history, it is to be hoped that Chairman Mitchell's vital leadership in the federal reform will come in time to be appreciated. See also Clark, *Foreword [to A Symposium on the Uniform Rules of Evidence]*, 10 RUTGERS L. REV. 479, 481 (1956).

<sup>4</sup> See Clark, *supra* note 3, suggesting a query whether the comparative failure of the summary-judgment rule may not have been somewhat due to a failure to follow this principle of drafting.

<sup>5</sup> "A famous English judge said that it was always his practice to get counsel to agree at the beginning of a trial as to the issues of fact to be tried." RAGLAND, *op. cit. supra* note 1, at 228, citing Jessel, M.R., in *Lowe v. Lowe*, 10 Ch. D. 432 (1876).

Doing these things well in advance of the time when the parties finally and definitively square off for trial has obvious advantages of shortening or eliminating the actual battle. In the hands of a skillful practitioner of the art, it may accomplish literally wonders in easing a congested docket. Of course, in less skilled hands it may easily degenerate into just another sparring match of shadow-boxing, thus adding expense and consuming time. It is interesting to see that the English, in their recent *Evershed Report*, feel that they cannot accept this American "preliminary canter" because, by adding a separate trial stage, it requires the extra retaining of barrister, leader and junior, and thus doubles the already extraordinarily high cost of litigation there.<sup>6</sup> They are sound to the point that this is a real stage of the litigation, requiring high talent, and is far different from the well-recognized dilatory motion or demurrer. So I stress that pre-trial requires real skill on the part of the judge. To me successful pre-trial represents the perfection of the judicial art; and the trial judge who is skillful in piloting a case thus promptly and effectively, either to speedy disposition on the merits or to settlement, has shown himself more effective in his work than one who may be able to turn out well-rounded opinions, but has not the tact and temper for the pre-trial conference.

In the past, of course, the spotlight has played upon the judicial opinion of the great judge—usually only one seated upon a high court of review. Such opinions have been unduly exploited; but their sheer load and weight will doubtless cause an ever-increasing drop in their value. I hope judges will come to realize more and more how they can demonstrate skill and effective use of their judicial post at this preliminary stage of litigation. One might particularly stress pre-trial in jury cases. Here the art of the judge may often seem at a low ebb, particularly if he treats his task merely as that of referee of a more or less sporting event. If, on the other hand, he has had a real hand at pre-trial in shaping the case to present its actual problems and in leading the counsel to define the issues with him, he will properly feel a responsibility and a rewarding sense of accomplishment that will not otherwise be his. Let me add that this conception of the pre-trial judge as the primary architect in preparing the case for adjudication necessarily carries with it the answers to several practical questions of technique, notably the time, the occasion, and the proper judge for pre-trial. The view I am emphasizing means necessarily that the proper judge should be the one who is to complete the work, namely, the presiding judge at the trial; while the time and the occasion will be not too far from the actual trial itself, lest much of the advantage be dissipated by the loss of close recent touch with the various trial concessions and agreements made by counsel.<sup>7</sup>

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<sup>6</sup> FINAL REP. OF THE COMMITTEE ON SUPREME COURT PRACTICE AND PROCEDURE, Cmd. No. 8878 §§214, 221, 223 (1953), as discussed in Clark, *The Evershed Report and English Procedural Reform*, 29 N.Y.U.L. REV. 1046, 1055, 1056 (1954).

<sup>7</sup> For discussion see REP. JUD. CONF. OF THE UNITED STATES, Sept. Sess. 1944,

I have stressed the opportunities for judicial craftsmanship thus opening before the pre-trial judge, but I think there are like opportunities for counsel's craftsmanship in the highest tradition of professional practice. Of course, if one is attuned to enjoy only the dramatics of the striking trial he is not apt to be presently content with the more prosaic, but more lasting victories of pre-trial. One of the difficulties an effective judge has to meet and conquer is the unwillingness of great trial counsel to confine themselves within its supposed limits. This is instanced most often by the dispatch of a junior clerk to answer at pre-trial while the great trial chief-tain is off winning victories on some more prominent battlefield. An effective pre-trial judge will naturally insist upon the appearance before him of a lawyer in full charge of the case and will inflict adequate sanctions upon counsel to secure this.<sup>8</sup> Pre-trial is not a matter for errand boys or clerks. Rather it is the high function of adjudication on the part of both judge and counsel. So the judge should inspire the lawyers with the same feeling he himself has of real accomplishment in joint task through this simple and direct method of case disposition. But I do conceive of this conference as one proper means, often overlooked, of developing young blood to the point of assuming proper responsibilities in the duties in the profession. One of the greatest problems of the congested trial calendar in metropolitan districts is the monopoly held by the few trial lawyers who cannot be in all courtrooms at once and who delay trials because of their supposed essentiality to their clients.<sup>9</sup> Even if their spectacular activities are thus necessary when trial impends, they certainly are not so essential at pre-trial, where quieter methods prevail; and here the studious junior should be allowed effective control of the dispute, which he probably knows even more thoroughly than his chief. Here is one method of developing and expanding the trial bar, somewhat as takes place so well and

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20, 21, 4 F.R.D. 83, 93, 98; VANDERBILT, *op. cit. supra* note 2, at 212, 213; 3 MOORE'S FEDERAL PRACTICE 1110-1112 (2d ed. 1948); Kincaid, *A Judge's Handbook of Pre-Trial Procedure*, 17 F.R.D. 437, 444, 445; NIMS, PRE-TRIAL 69-78, 148-151 (1950); THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE, A HANDBOOK PREPARED BY THE SECTION OF JUDICIAL ADMINISTRATION, A.B.A., 51-55 (3d ed. 1952). The 1956 REP. OF THE TEMPORARY COMMISSION ON THE COURTS, LEGIS. DOC. (1956) No. 18, pp. 76-79, recommends an early Pre-Trial of Personal Injury and Death Actions after such actions are placed on the trial calendars where in metropolitan areas there is still a delay of several years in contemplation. As a means of speeding up settlement negotiations and weeding out cases not actually to be tried, this may be a desirable or necessary departure from a usual optimum where trials are not thus delayed.

<sup>8</sup> As in *Stanley v. City of Hartford*, 140 Conn. 643, 103 A. 2d 147 (1954).

<sup>9</sup> For references to this chronic situation, see, e.g., Demeusy, *Justice in a Jam*, 28 CONN. B. J. 369, 372 (1954); Baldwin, *How Can We Expedite the Business of the Courts?* 27 CONN. B. J. 1-10 (1953), presenting revealing statistics; and reports by the Administrative Office of the United States Courts on congestion in particular courts, such as the United States District Court for the Eastern District of New York.

so famously among English barristers when the junior must take over if his leader is otherwise engaged.

Now I turn more specifically to the stated purposes of pre-trial as set forth in Rule 16. Of the six there noted, "The simplification of the issues" comes first. This perhaps is the over-all purpose of the entire rule. For as the case is isolated from the general stream of all the cases flowing through the court—the majority of course to achieve only settlements without actual trial—the manner and method of its advancement are primarily to determine what is in actual dispute. Hence the third and fourth purposes, namely, "The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof," and "The limitation of the number of expert witnesses," are a part of this same process. The judge finds out what the case is all about, how much is admitted on each side, and how much not, and then he goes on to the question of manner of proof. This is pre-trial at its most effective level.<sup>10</sup>

Here one notes a great and at first glance serious omission from the stated purposes; there is nothing said as to procuring settlement or advancing negotiations for settlement of the case. This omission was, however, deliberate, even though such settlements are often the substantial by-product of pre-trial. But it has been felt, and experience supports this, that settlement will come naturally in many cases as the issues are defined and made clear and simple. On the other hand, it is dangerous to the whole purpose of pre-trial to force settlement upon unwilling parties and to make the conference the recognized instrument of compelled negotiations. Pre-trial used as a club to force settlements will destroy its utility as a stage of the trial process itself and will pretty surely lead to its elimination as its potentialities for unfairness become more apparent to litigants and their counsel.<sup>11</sup>

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<sup>10</sup> This is illustrated by the dramatic demonstrations by the masters of pre-trial, of which several are illustrated in NIMS, *op. cit. supra* note 7, at 203-249; and numerous others are given in authorities cited in note 7 *supra*. See also *Pre-Trial Clinic*, 4 F.R.D. 35-79; *Demonstrations of the Pre-Trial Conference*, 11 F.R.D. 3-43. Various other matters may be settled at pre-trial, as occasion arises, such as rulings on discovery, or evidence, or claim of trial by jury, the date and probable length of trial, or controlling issues of law or jurisdiction and so on. See 3 MOORE'S FEDERAL PRACTICE 1121-1123 (2d ed. 1948); Kincaid, *supra* note 7, at 442, 443. Control of expert testimony may take on additional significance in view of the success of the Medical Expert Testimony Project of the Association of the Bar of the City of New York. See the monograph, IMPARTIAL MEDICAL TESTIMONY, published by the Association in 1956.

<sup>11</sup> For similar views see authorities in note 7 *supra* and NIMS, *op. cit. supra* note 7, at 62-63, 133-134. See also Clark & Clark, *Some Further Reflections on Court Reform in Connecticut*, 25 CONN. B. J. 95, 108, 109 (1951), commenting on a settlement calendar as proposed in Connecticut; Brown, 25 CONN. B. J. 194, 196 (1951); cf. Phillips, *Possibilities of the Uncontested Liability List*, 29 CONN. B. J. 134 (1955).

The second stated purpose of the rule is "The necessity or desirability of amendments to the pleadings." This should be the occasion when the formal pleading should be settled; and hence if anything has developed requiring an expansion of the previously filed pleadings, this should be taken care of. Some courts use the conference as the means of requiring more detail in these formal documents than the rules themselves contemplate—indeed, of forcing a return to principles of common-law particularization at variance with the spirit of the rules; and, thus having forced an unnatural particularization, they drive the matter home through the device of formal stipulation that such details, not the pleadings proper, now control. It is true that the individualization of the case noted above can properly give the judge some scope for his own ideas as to the way a case should be piloted forward. Perhaps a part of the success of the Federal Rules has been this opportunity for the judges who may not have agreed in over-all purpose with the general program of the Federal Rules and who have used the pre-trial as a means of securing more detail in the pleadings than the rules themselves contemplate.<sup>12</sup> A certain degree of flexibility is desirable, and has been helpful in practice. But this is an area of pre-trial which cannot serviceably be carried far. The rules have advanced beyond special pleading; and it is a real hardship, without material gain in my judgment, to bring it back through the manipulation of pre-trial. Such a course, too, will bring its serious problems as to the inviolability of overnarrow issues when once the trial is reached—often, as we know, with newly and specially employed counsel. The pressure then to reopen the pre-trial order will be difficult to resist.<sup>13</sup> Pre-trial, however helpful, cannot be used to shut out those issues which litigants are really convinced they should raise; and it wastes time, as well as brings in question the whole process, if too drastic limitation is attempted. Hence while the process of amendment or repleading is a necessary one to take care of real mistakes or new developments, it should not be resorted to as a way of particularization not contemplated in the plan and purpose of the rules.

Other and more general provisions of Rule 16 carry forward this same objective, namely, of making clear those issues which actually divide the parties. The rule definitely directs the making of an order reciting these actions taken and limiting the actual issues as settled by the admis-

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<sup>12</sup> Fee, *The Lost Horizon in Pleading under the Federal Rules of Civil Procedure*, 48 COLUM. L. REV. 491 (1948); Fee, *Justice in Search of a Handmaiden*, 2 U. OF FLA. L. REV. 175 (1949).

<sup>13</sup> See McDowall v. Orr Felt & Blanket Co., 146 F. 2d 136 (6th Cir. 1944); Jenkins v. Devine Foods, Inc., 3 N. J. 450, 70 A 2d 736, 22 A.L.R. 2d 593, with annotation at 599 (1950), and with Note, *Variance from the Pre-Trial Order*, 60 YALE L. J. 175 (1951); Schlossberg v. Jersey City Sewerage Authority, 15 N. J. 360, 104 A. 2d 662 (1954); Owen v. Schwartz, 177 F. 2d 641 (D.C. Cir. 1949); Fernandez v. United Fruit Co., 200 F. 2d 414 (2d Cir. 1952), *cert. denied*, 345 U. S. 935 (1953); Bucky v. Sebo, 208 F. 2d 304 (2d Cir. 1933).

sions or agreements of counsel. Some judges have hoped to avoid something of the bugaboo of formal judgments here, and one can sympathize with them when one considers the several-page pre-trial order of certain courts.<sup>14</sup> But as indicated, such orders really go beyond the needs of effective pre-trial. On the other hand, unless pre-trial has ended in a definite order, it has served no purpose other than to push the parties toward settlement—a purpose which, as stated above, is doubtful when thus isolated. A pre-trial order is an absolute necessity if the good accomplished by the conference itself is to be preserved for the further disposition of the case and in the trial itself.<sup>15</sup> This order should control the further operation of the case, subject, however, to the very difficult question of its modification at the trial “to prevent manifest injustice.” It is of the highest part of the judicial process for the judge to have produced a pre-trial order which, except in the very unusual case of change of circumstances, will not require a later modification.<sup>16</sup>

Rule 16 goes further and provides for the establishment of pre-trial calendars in the discretion of the court. It is interesting here to note the additional suggestion that perhaps the court may wish to establish a pre-trial calendar only for jury cases, with the obvious implication that here may be the greatest opportunity for effective results from pre-trial. I mention this particularly, since some tribunals tend to believe that pre-trial cannot be effective in the ordinary jury negligence case. Of course this is a hotly disputed point, the experience of such important jurisdictions as New Jersey being definitely to the contrary.<sup>17</sup> This touches, too, upon another moot question, namely, whether pre-trial should be required in all cases. A closely knit and integrated court such as that of New Jersey may definitely and profitably adopt a requirement applicable alike to substantially all cases. In the far-flung federal system, with all the diversities of practice among the lawyers and of temperament and attitude among the judges, it has not been possible or desirable to enforce such a mold. Here it has proved wiser as the rule permits to leave this in the discretion of the judges, and then by work of devoted exemplars

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<sup>14</sup> See *King v. Edward Hines Lumber Co.*, 68 F. Supp. 1019 (D. Ore. 1946) (9 pages); *Montgomery, Ward & Co. v. Northern Pacific Terminal Co. of Oregon*, 17 F.R.D. 52 (D. Ore. 1954) (1420 pages, plus 2200 pages of schedules); *Clark v. United States*, 13 F.R.D. 342, with order at 346-406 (D. Ore. 1952).

<sup>15</sup> This, too, is the view of the authorities cited in note 7 *supra*.

<sup>16</sup> See cases note 13 *supra*.

<sup>17</sup> New Jersey, Superior Court Rule 4:29; *MANUAL OF PRETRIAL PRACTICE*, SUPREME COURT OF NEW JERSEY 1-3 (1955); Vanderbilt, *Clearing Congested Calendars*, 39 MASS. L.Q. 9, 14 NACCA L.J. 326 (1954); Brennan, *Remarks on Pre-Trial*, 17 F.R.D. 479; Ackerson *Pretrial Conferences and Calendar Control: The Keys to Effective Work in the Trial Courts*, 4 RUTGERS L. REV. 381 (1950); Vanderbilt, *The Five Functions of the Lawyer: Service to Clients and the Public*, 40 A.B.A.J. 31, 33 (1954); Karcher, *New Jersey Streamlines Her Courts: A Revival of "Jersey Justice"*, 40 A.B.A.J. 759, 761 (1954).

and counselors to attempt to support the extension of the movement.<sup>18</sup> This is a wise and effective way, to which this symposium will contribute notably. If it can help to promote the conviction that the judge's finest accomplishment is adjudication on the basis of a case properly developed by astute counsel, with his own pronouncements largely muted, rather than the ex-cathedra pronouncement of the formal opinion, much indeed will have been accomplished for the better administration of justice in our trial courts.

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<sup>18</sup> See NIMS, *loc. cit. supra* note 7, and the distinguished judges there cited and quoted; and see also especially Murrah, *Pre-Trial Procedure*, 14 F.R.D. 417; Kincaid, *supra* note 7; and the invaluable yearly reports of the COMMITTEE ON PRE-TRIAL PROCEDURE, JUD. CONF. OF THE UNITED STATES, of which the Honorable Alfred C. Murrah is chairman.